89-1287

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States
October Term, 1989

RICHARD K. JACQUIN,
Petitioner,

vs.

WALTER STENZIL, Warden,
Nassau County Correctional Center,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a State Court's finding of a procedural bar to the review of a substantial constitutional question on the merits is ultimately a Federal question which may be reviewed by a Federal Court on a *habeas corpus* application or whether the Federal Court is divested of jurisdiction to review the procedural determination by virtue of the State Court holding.

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OPINIONS AND JUDGMENTS BELOW

Petitioner was convicted in the County Court of Nassau County New York (CAPILLI, J.) by judgment entered July 11, 1985 of the Violation of New York Vehicle and Traffic Law § 1192 (2), Driving While Intoxicated as a Felony.

The Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department affirmed the judgment on November 3, 1986. That court's opinion is reported at *People v. Jacquin*, 124 A.D.2d 594, 507 N.Y.S.2d 736 (2nd Dept. 1986).

An Associate Judge of the Court of Appeals of the State of New York granted leave to appeal to that court and the New York Court of Appeals entered an order affirming the order of the Appellate Division on March 17, 1988. The opinion of the Court of Appeals is reported at *People v. Jacquin*, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988).

On October 7, 1988 petitioner filed a peti-

tion for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York. On January 18, 1989 the Honorable Jacob Mishler, United States District Judge, entered a memorandum decision and order dismissing the petition for a writ of *habeas corpus*. (9-17)[1]

On February 21, 1989 Judge Mishler entered a memorandum decision and order granting a certificate of probable cause pursuant to which an appeal was taken to the United States Court of Appeals for the Second Circuit. (19-20)

On September 28, 1989, under Docket No. 89-2064, the United States Court of Appeals affirmed the order of the District Court (21) in an opinion by the Honorable Ralph K. Winter, United States Circuit Judge. (2-8)

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[1]Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix which is annexed hereto.

JURISDICTION

Petitioner commenced the proceeding seeking a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The United States District Court granted a certificate of probable cause pursuant to 28 U.S.C. § 2253 by virtue of which an appeal was taken to the United States Court of Appeals.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the

courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Petitioner was convicted under the Vehicle and Traffic Law of New York of the crime of Driving While Intoxicated as a Felony.[2]

On May 6, 1983, petitioner, Richard K. Jacquin was arrested for Driving While Intoxicated. It is conceded by all parties that he was not provided with *Miranda* warnings. He refused to take a breathalyzer examination which, under the Vehicle and Traffic Law of New York, subjected him to the suspension and/or revocation of his privilege to drive within the State by the Commissioner of Motor Vehicles of New York. He received warnings only with respect thereto and continued to decline the breathalyzer examination.

Mr. Jacquin was then taken to the Central Testing Unit of the Nassau County Police and,

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[2]After several days of incarceration, the Appellate Division of the New York Supreme Court fixed bail pending appeal. Petitioner has remained at liberty under probationary supervision during the pendency of his State and Federal appeals. The Nassau County Court has agreed to allow him to remain at liberty under probationary supervision pending the determination of this application.

again without the administration of *Miranda* warnings, and without asking his consent therefor, a performance test was administered.

That performance test was videotaped. In addition to directing Mr. Jacquin to perform certain physical functions, Mr. Jacquin was asked several questions including, "How long have you had your driver's license? . . . [K]nowing that your license will be suspended do you still refuse to take the [breathalyzer] test? . . . Do you have any injures? . . . Are you diabetic?"

After indictment, the petitioner made motions to the Nassau County Court to suppress various evidence including the videotape of the performance test. The County Court referred the matter to a Judicial Hearing Officer[3] and hearings were conducted. At the conclusion of those hearings the Judicial Hearing Officer entertained argument. At that time the petitioner, through counsel, objected to the

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[3] The Honorable Harold E. Collins, a retired Judge of that court.

audio portion of the videotape in its entirety as violative of *Miranda*. The Judicial Hearing Officer indicated that, at times, the course the courts take is to allow the video portion to be played to the jury and to redact the audio portion.

Counsel made his objection in the following colloquy:

> MR. LEGUM: It goes beyond that. I agree with the District Attorney's position, he can be videotaped. He has no Fifth Amendment right so he can be videotaped. What I'm saying is that they cannot get around the *Miranda* question by videotaping the questions and answers.
>
> THE COURT: Just what statements were made on that videotaped that you think are the subject to *Miranda* rulings?
>
> MR. LEGUM: Any questions there beyond refusal,[4] and there were conversations.
>
> THE COURT: That is in relation to the refusal.
>
> MR. LEGUM: No, beyond

[4]It has consistently been held that evidence of the refusal to take the breathalyzer examination is admissable and exempt from *Miranda*.

> that. In relationship to the performance test, they ask him "Do you understand, we'll put these coins down. Do you understand what to do?" Questions about the discussions about his glasses. These are all questions and answers. That goes beyond the refusal issue. It is my position not that the tape itself, by virtue of the fact that he is being videotaped, that is permissible. What is impermissible is the questions and answers contained on the tape and can't get around the *Miranda* warnings by putting it on the videotape. Perhaps they may be able to show the video portion to the jury without the audio portion.

The Judicial Hearing Officer provided both the prosecution and defense with the opportunity to submit authority on that issue and both sides availed themselves of that opportunity. Thereafter the Judicial Hearing Officer issued an opinion specifically addressing the *Miranda* objections under both State and Federal law, finding no constitutional violation. The Judge of the County Court confirmed the

report of the Judicial Hearing Officer.

At trial the videotape was played in its entirety, without objection.[5]

The jury convicted the petitioner. Petitioner was sentenced to a monetary fine, revocation of his license, as well as a term of incarceration.

At no point in the proceedings did the prosecution claim that the objection which was raised at the conclusion of the pre-trial hearings failed to preserve the issue. Rather, on appeal to the intermediate level appellate court, the issue was briefed on the merits and, in fact, the Appellate Division of the Supreme Court addressed the issue on the merits.

Thereafter a hearing was held by telephone with the Honorable Stewart F. Hancock, Jr., an Associate Judge of the New York Court of Appeals. Judge Hancock specifically asked

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[5] The prosecution has conceded that under New York law the objection at a pre-trial hearing is sufficient to preserve the issue. Once a Court has overruled, at a pre-trial stage, the constitutional objections, no objection need be made at trial.

counsel whether there was any question as to preservation. When assured that there was no issue as to preservation, Judge Hancock asked for relevant portions of the transcript. Those portions of the transcript were provided to him and Judge Hancock granted leave to appeal to that court.

On the appeal to the Court of Appeals, once again, no issue was raised by the State as to preservation. Rather, the Court of Appeals ruled, *sua sponte,* that ". . . inasmuch as he moved to suppress audio portions of the tape generally and failed to identify the specific questions and answers he found objectionable, the contentions of inadmissability he now raises are unpreserved and beyond our review (*see, People v Tutt*, 38 NY2d 1011)." *People v. Jacquin*, 71 N.Y.2d 825, 826-27 (1988).

On his petition for a writ of *habeas corpus* petitioner raised the same objections to the District Court as were raised in State Court. The District Court, however, felt it was bound

by the determination of the State Court with respect to its own procedural rules and therefore dismissed the petition. (14)

The Court of Appeals, in its opinion, summarized petitioner's argument in the following two sentences:

> Jacquin's principal argument is that the issue of reviewability is itself a federal question and that the merits of a particular state procedural bar must be examined by federal courts. We disagree.

(6)

While the Court of Appeals went on to indicate that a State Court cannot instate rules to deliberately vitiate federal rights, the petitioner would have to show "cause" for the failure to preserve the issue under the cause and prejudice test. Absent such showing, however, the determination of the State Court was immune from Federal review.

REASONS FOR GRANTING WRIT

It is respectfully submitted that the Court of Appeals' holding in the instant matter is at variance with the holding in other circuits and is at variance with the holdings of this Court. It was argued to the Court of Appeals that the issue of preservation is ultimately a Federal question which a Federal Court may review. It had been maintained by the petitioner that the State Court could not divest the Federal Court of jurisdiction, and certainly not of the right to explore the question, by virtue of an erroneous application of its procedural rules. The Court of Appeals held that the State Court could do so.

Other circuits have similarly held. In *Urquhart v. Lockhart*, 726 F.2d 1316 (8th Cir. 1984) the Court of Appeals held that the failure to comply with State procedural rules precluded the Federal Courts from considering the question unless the cause and prejudice test is met. *Id.* at 1318. Similarly the Fifth Circuit, in

Young v. Herring, 777 F.2d 198 (5th Cir. 1985) held that it was bound by the State determination on procedural issues.

In contrast, the First Circuit, in reliance on this Court's opinions, has held that it may, and in fact did, go behind the State Court's finding of a State procedural default to explore its propriety. It found that the State Court holding could not preclude Federal review of the merits of the claim.[6] *Spencer v. Zant*, 715 F.2d 1562, 1573 (1st Cir. 1983).

The Third Circuit, in *Reynolds v. Ellingsworth*, 843 F.2d 712 (3rd Cir. 1988), also felt it was not constrained by a State determination on its [the State's] own procedural rules. Rather, there the Court of Appeals reviewed the state of Delaware law and found, the State Court holding to the contrary notwithstanding,

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[6]The Court should be aware that the underlying claim on the merits presents a substantial Federal issue. The Court of Appeals stated, albeit in *dicta*, that some of the questions and answers are subject to *Miranda*. Moreover, this Court on October 16, 1989 granted certiorari on the underlying issue, to wit: the admissability of the audio portion of a videotape of a performance test *sans* the *Miranda* warnings. *Pennsylvania v. Munoz*, Docket No. 89-213.

that ". . . the Delaware court's invocation of *Conyers*[7] is not consistent with other state authority." *Id.* at 719.

Those holdings seem to be consistent with the policy pronouncements of this Court which, it is respectfully submitted, demonstrate the conflict between the Court of Appeals' holding in the instant matter and the directives of this Court.

In *Picard v. Connor*, 404 U.S. 270 (1971), the Court stated that the general rule is that, in order for a Federal Court be able to review the merits of a *habeas* claim, all that need be raised in the State Court is the "substance" of the claim. *Id.* at 278.

Further, while the Court of Appeals in *Jacquin* held:

> Jacquin's principal argument is that the issue of reviewability is itself a federal question and that the merits of the particular state procedural bar must

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[7] *Conyers v. State*, 422 A.2d 345 (Del. 1980), the case upon which the State Court relied.

make a threshold determination of their propriety. In contrast to the holding of the Court of Appeals herein, the Court did not feel that it was bound by the State determination. Rather, only after determining that this State determination was well and properly founded under State law did it hold that a *habeas* petitioner, in order to have his claim adjudicated on the merits, must establish the requisite elements under the cause and prejudice test.

The New York Court of Appeals predicated its holding of a lack of preservation upon its prior holding in *People v. Tutt*, 38 N.Y.2d 1011 (1976). In *Tutt*, the New York Court of Appeals held that a single categorical objection by a criminal defendant that he was not provided his constitutional admonitions prior to interrogation failed to preserve the completely distinct issue posited for the first time by him on appeal, to wit: whether the criminal defendant was advised of his right to counsel prior to questioning. The rationale of the New York

Court of Appeals in *Tutt* was that the prosecution was not provided a fair opportunity to rebut the claim at the *nisi prius* level and, accordingly, it would be unfair ("sandbagging") to allow the claim to be raised for the first time on appeal. In marked contrast, here the State was apprised of the nature of the petitioner's constitutional objections at every level. Indeed, on the petition for a writ of *habeas corpus*, the State never argued that, as it understood the state of New York law prior to the New York Court of Appeals' holding in *Jacquin*, the issue had not been properly preserved. Rather, exploring the underlying facts of what transpired in State Court, it would appear that the New York Court of Appeals' holding was inconsistent with prior New York precedents and that, indeed, the issue had properly been raised at every level.

The policy behind the contemporaneous objection rule under New York law is for the purpose of apprising the court of the nature of

the objection being raised and affording the court the opportunity to address and resolve the issue. *See, e.g.,* 4 N.Y. Jur.2d *Appellate Review*, § 114.

Neither the District Court nor the Court of Appeals reviewed these issues since both explicitly held that they were constrained by the State Court holding with respect to the purported procedural default. As has been set forth *supra*, this is inconsistent with the holdings in other circuits and would appear to be inconsistent with the teachings of this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted; this Court should review the determination by the United States Court of Appeals for the Second Circuit and resolve the conflict between the circuits and its own holdings.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE GRANTED.

Respectfully submitted,

CARLUCCI & LEGUM
Attorneys for Petitioner

by: _____
STEVEN G. LEGUM

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1350—August Term, 1988

(Argued: July 17, 1989 Decided: September 28, 1989)

Docket No. 89-2064

RICHARD K. JACQUIN,

Petitioner-Appellant,

—v.—

WALTER STENZIL, Warden,
Nassau County Correctional Center,

Respondent-Appellee.

Before:

WINTER and MAHONEY, *Circuit Judges*,
and RE,* *Judge*.

Appeal from a decision of the United States District Court for the Eastern District of New York (Jacob

* The Hon. Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

Mishler, *Judge*) denying a petition for habeas corpus on the ground that a state procedural default precludes review of his claim.

Affirmed.

STEVEN G. LEGUM, Mineola, New York (Carlucci & Legum, Mineola, New York, of counsel), *for Petitioner-Appellant*.

PETER R. SHAPIRO, Nassau County Assistant District Attorney, Mineola, New York (Denis Dillon, Nassau County District Attorney, Bruce E. Whitney, Nassau County Assistant District Attorney, Mineola, New York, of counsel), *for Respondent-Appellee*.

WINTER, *Circuit Judge*:

Richard K. Jacquin appeals from the denial of his petition for a writ of habeas corpus. Jacquin was convicted by a New York state court for driving while intoxicated. His conviction was based in part on a videotape of a performance test. At a pre-trial suppression hearing, his counsel objected to the admission of the entire audio portion of the videotape containing questions and answers on the ground that the answers were obtained in violation of Jacquin's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The tape with the audio portion was admitted, and Jacquin was convicted. The New York Court of Appeals affirmed, holding *sua sponte* that Jacquin had failed to

preserve the *Miranda* issue for appellate review under New York state law. Judge Mishler dismissed Jacquin's petition for a writ of habeas corpus but granted him a certificate of probable cause for this appeal. We affirm on the ground that a procedural default under state law precludes review.

In the early morning hours of May 6, 1983, a Nassau County police officer observed Jacquin driving his car erratically in Garden City, New York. After pulling Jacquin over, the odor of alcohol and Jacquin's difficulty in standing gave the officer ample reason to doubt his sobriety. Jacquin's statement, "You got a winner here . . . . I can't pass no test," did little to allay the officer's suspicion.

The officer took Jacquin to the police headquarters' Central Testing Unit, where Jacquin twice refused to take a breathalyzer test. Without reading a *Miranda* warning to Jacquin, an officer activated a videotape machine to record everything that Jacquin did and said while being given a "performance test." The performance test involved Jacquin's picking up coins from the floor and putting them on a table, walking a line heel to toe, standing straight with head back, and touching the tip of his nose with his fingertips. These acts were accompanied by various oral interchanges between Jacquin and an officer. Jacquin was required to answer a number of questions, including routine pedigree information. Also among the questions were the following: "How long have you had your driver's license? . . . [K]nowing that your license will be suspended do you still refuse to take the [breathalyzer] test? . . . Do you have any injuries? . . . Are you diabetic?"

At a suppression hearing on March 22, 1985, defense counsel objected to the admission of all the questions, answers and other interchanges recorded on the videotape

on the ground that admission would violate Jacquin's *Miranda* rights. The hearing judge asked defense counsel to particularize the statements subject to *Miranda* rulings, and counsel stated that "[a]ny conversation there beyond refusal" was the object of his *Miranda* claim. The judge thereafter admitted the videotaped questions and answers in their entirety.

At trial, the videotape was played to the jury without objection by defense counsel. Defense counsel also made no Fifth Amendment-based objection to the admission of a police form with many of the same questions and answers on it. The jury convicted Jacquin of the felony of driving while intoxicated, and he was sentenced to sixty days' imprisonment, five years' probation, a $500 fine, and revocation of his driver's license for one year. Jacquin appealed his conviction to the Appellate Division. On appeal, the state made no claim that Jacquin had failed to preserve his *Miranda* objection, and the Appellate Division reached the *Miranda* issue and affirmed on the merits.

Jacquin was then accorded leave to appeal to the New York Court of Appeals. Again, the state did not argue that he failed to preserve the *Miranda* issue. The Court of Appeals affirmed, holding *sua sponte*, however, that Jacquin's motion to suppress the entire audio portion of the videotape was insufficient to preserve the *Miranda* issue for appeal. It was necessary, the court stated, for Jacquin's lawyer "to identify the specific questions and answers he found objectionable" in order to preserve the issue for review. *People v. Jacquin*, 71 N.Y.2d 825, 826, 522 N.E.2d 1026, 1027, 527 N.Y.S.2d 728, 729 (N.Y. 1988).

Jacquin thereupon petitioned in the Eastern District for a writ of habeas corpus arguing that his impending imprisonment[1] violated his federal constitutional rights. Judge Mishler dismissed the petition, holding that Jacquin's claims were barred under *Wainwright v. Sykes*, 433 U.S. 72 (1977). In *Wainwright*, the Supreme Court held that a state court's "adequate and independent" finding of procedural default will bar federal habeas review, unless the petitioner can show "cause and prejudice."

Jacquin's principal argument is that the issue of reviewability is itself a federal question and that the merits of a particular state procedural bar must be examined by federal courts. We disagree. States are free to fashion their procedural rules according to their perception of their own needs. Of course, a state may not create procedural rules that deliberately vitiate federal rights, and a reasonably unanticipated finding of procedural default may satisfy the "cause" requirement of *Wainwright*. *See Reed v. Ross*, 468 U.S. 1, 16 (1984). Neither condition obtains in the present case, however. Some portions of the audio involved pedigree information that is not subject to *Miranda* procedures. *See United States v. Carmona*, 873 F.2d 569, 573 (2d Cir. 1989); *United States v. Adegbite*, 846 F.2d 834, 838 (2d Cir. 1988). Other portions were not testimonial but merely demonstrative of Jacquin's capacity to remember, to respond coherently to questions and to speak clearly. His ability or inability to do these things was indicative of his sobriety or lack thereof. The audio portion was thus not unlike a voice sample, *see United States v. Wade*, 388 U.S. 218 (1967), handwriting exemplar, *see Gilbert v. California*, 388 U.S. 263 (1967), or a vial of

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1 After Jacquin had been incarcerated for several days, the Appellate Division granted bail. He has remained at liberty under probationary supervision during the pendency of his appeals and the present action.

blood, *see Schmerber v. California*, 384 U.S. 757 (1966), all of which have been held not to implicate Fifth Amendment rights.

Much of the audio portion of the videotape in the instant case was thus admissible. Some portions may have had both testimonial and demonstrative aspects, however, and might have been subject to a valid *Miranda* objection. Certainly police cannot be allowed to circumvent *Miranda* by conducting an interrogation under the guise of a performance test. Nevertheless, the fact that some portions might have been testimonial and implicated *Miranda* was deemed by the New York Court of Appeals to be irrelevant because Jacquin's counsel failed to designate the offending portions. Nothing in that ruling intrudes on or impedes the effectuation of *Miranda* rights. Specificity in an evidentiary objection is also required in federal courts to preserve an issue for appeal. *See* Fed. R. Evid. 103(a)(1). Moreover, it appears that Jacquin's counsel was using the *Miranda* objection as a means of excluding demonstrative as well as testimonial evidence. He was properly concerned with his client's incriminating performance as demonstrated through the medium of sound. Eliminating only a portion of the audio would have been of little aid to that cause and so he understandably made, and staunchly adhered to, the wholesale objection, despite prodding by the court for a more specific objection. That clearly amounts to a waiver of all narrower claims.

The fact that the ruling in *Jacquin* was *sua sponte* is also of no consequence. The failure of the prosecution to argue a procedural bar does not disable a state court from recognizing one where it exists. At the time of trial, there was ample reason to anticipate that a wholesale objection would not preserve the *Miranda* issue, *see People v. Tutt*,

38 N.Y.2d 1011, 348 N.E.2d 920, 384 N.Y.S.2d 444 (1976) (mem.), and Jacquin cannot now claim surprise in an effort to meet the cause requirement of *Wainwright*. Because Jacquin is unable to show cause, it is unnecessary for us to reach the issue of prejudice, the second prong of the *Wainwright* analysis.

We have examined Jacquin's remaining claims and find them to be without merit.

Affirmed.

United States District Court
Eastern District of New York

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RICHARD K. JACQUIN,

Petitioner,

-against-

WALTER STENZIL, Warden, Nassau County Correctional Center,

Respondent.

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CV 88-3137

Memorandum of Decision and Order

January 18, 1989

APPEARANCES:

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MISHLER, District Judge

Petitioner, Richard Jacquin, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and based on alleged violations of his rights under the Fifth and Sixth Amendments of the Constitution.

Facts

The relevant facts underlying this petition are as follows:

On May 6, 1983, petitioner was driving at

about 1:00 a.m., when Officer Andrew Schneider of the Nassau County Police Department observed the petitioner's automobile acting in an erratic manner. The officer activated his police lights, causing petitioner to stop his car. The officer approached the car, identified himself, and requested petitioner's license and registration. Petitioner fumbled through his wallet, spilling some documents into his lap. Schnieder noticed an odor of alcohol emanating from the car. The officer asked the petitioner to exit the car; petitioner lost his balance and needed to steady himself, and the officer could smell the odor of alcoholic beverages on petitioner's breath. Petitioner twice declined to take a performance test, at which point Schneider informed petitioner that he was under arrest, because the officer believed the petitioner was intoxicated.

Without informing petitioner of his *Miranda* rights, Schneider took him into custody, drove petitioner to the rear of the Nassau

Country Police Headquarters, completed some paperwork (including a form indicating petitioner's refusal to take a breathalyzer test), and escorted petitioner into a testing unit. There, Police Officer John McCormick activated a videotape camera and administered a series of performance tests which were recorded on videotape. During the performance tests, petitioner was required to answer a number of questions.

The action against petitioner began as a felony complaint; as a result of plea negotiations, a superseding prosecutor's information was filed on June 17, 1983, charging petitioner with a misdemeanor. On December 9, 1983, respondent informed petitioner that unless he pled guilty to the misdemeanor, the prosecution would seek a felony indictment. On December 14, a felony indictment was returned from the grand jury.

At a pre-trial hearing, counsel for petitioner objected to the videotape, and suggested

that the audio portion be redacted because of the testimonial nature of the questions and answers contained therein. (Tr. at 46-47). In an opinion dated May 10, 1985, the judicial hearing officer determined that the videotape contained only physical evidence, and overruled petitioner's objections.

After a jury trial on July 11, 1985, petitioner was convicted of operating a motor vehicle while intoxicated, in violation of § 1192(2) of the N.Y. Vehicle and Traffic Law. The New York Appellate Division affirmed the judgment on November 3, 1986, *People v. Jacquin*, 124 A.D.2d 594, 507 N.Y.S.2d 736 (2d Dept. 1986), and the New York Court of Appeals affirmed the judgment *People v. Jacquin*, 71 N.Y.2d 825, 527 N.Y.S.2d 728 (1988). On October 7, 1988, petitioner filed the instant petition for a writ of habeas corpus.

Preservation of the
Fifth Amendment Claim

Before considering petitioner's Fifth Amendment claim, this court must first address a

threshold question: whether the New York Court of Appeals' determination that the issue was not preserved for appeal, *People v. Jacquin*, 71 N.Y.2d 825, 527 N.Y.S.2d 728, 729 (1988), prevents review of the issue in a habeas proceeding.

A substantial body of case law, beginning with the Supreme Court's opinion in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977) bars federal habeas review of issues that have been waived through a procedurai default, such as a failure to comply with a contemporaneous objection rule, absent a showing of cause for and prejudice from the default. *Wainwright*, 97 S.Ct. at 2506. The procedural default in question is counsel's failure to comply with the contemporaneous objection rule which is codified in New York Crim. Pro. Law § 470.05 (1). The New York Court of Appeals indicated that this default arose, despite counsel's failure to (1) identify specific questions and answers which violated petitioner's Fifth Amendment

rights, and (2) object to the admission of police reports at trial which "contained many of the same questions and answers." *Jacquin*, 52 N.Y.S.2d at 729.

Petitioner urges that because "the determination of the State Court can only be viewed as palpably in error," this court should hear the merits of petitioner's Fifth Amendment claim. (Petitioner's Memorandum at 6-8). In this regard, it should be noted that counsel for respondent candidly concedes that:

> the respondent is aware of no other state authority for the proposition that evidence, once objected to and specifically ruled admissable by a *nisi pius* court prior to trial, must be met with an objection when it is actually presented at trial.

(Respondent's Memorandum at 6). In fact, the respondent cites authority for the proposition that a defendant's pre-trial motion to suppress evidence generally preserved the issue for appellate review. See *People v. DeBour*, 40 N.Y.2d 210, 214, 386 N.Y.S.2d 375, 379 (1976). How-

ever, it is not within the authority of this court to review the propriety of a declaration of state procedural law by that state's highest court. In *Rosenfeld v. Dunham*, 820 F.2d 52 (2d Cir. 1987), *cert. denied*, __ U.S. __ 108 S.Ct. 463 (1987), in a case which grappled with a procedural default under New York's contemporaneous objection rule, the court held that:

> When a state appellant court refuses to consider the merits of a petitioner's claims on account of his procedural failure to preserve his rights by objection at the time, then a federal court may not review those merits in a collateral habeas corpus proceeding, unless petitioner demonstrates both good cause for and actual prejudice resulting from his procedural noncompliance with the contemporaneous objection rule.

Rosenfeld at 54 (citing *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1983). In establishing the "cause and prejudice" standard, the Supreme Court wanted to prevent habeas review from "undercutting the State's ability to enforce its

procedural ruling." *Engle v. Issac*, 102 S.Ct. at 1572. Thus, because the New York Court of Appeals has ruled that petitioner's Fifth Amendment claim was unpreserved, this court may not consider that claim unless counsel for petitioner satisfies the *Wainwright* test.

The concept of "cause" has not been specifically defined by *Wainwright* and its progeny; in fact, the *Wainwright* court explicitly refrained from giving the term content. *Wainwright*, 97 S.Ct. at 2508. Petitioner contends that this element is satisfied because petitioner's argument is sufficiently novel so as to fall within the exception established in *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901 (1984) (holding the novelty of a constitutional claim may satisfy the cause element of the *Wainwright* test). However, in *Reed v. Ross*, the Court addressed a claim which is so novel that its legal basis "is not reasonably available to counsel." *Reed*, 104 S.Ct. at 2910. This is not true in the present case: although petitioner's claim may be

a matter of first impression, it is not "novel" as defined by *Reed* because it is based on well-established law that was available at the time of trial. The fact that counsel raised the argument at a pre-trial hearing is a strong indication that counsel had "a reasonable basis upon which to formulate a constitutional question" at the time of trial. *Reed*, 104 S. Ct. at 2909.

Even if counsel were able to demonstrate "cause" for his failure to object to the videotape at trial, based on his pre-trial objection, this would not excuse counsel's failure to object to the admission of police form 38 "which contained many of the same questions and answers." *Jacquin*, 71 N.Y.2d at 826. Therefore, *Wainwright* bars consideration of petitioner's Fifth Amendment claim.

The Sixth Amendment Claim

Petitioner contends that the felony indictment which was obtained as a result of his failure to plead guilty to the misdemeanor charge amounts to prosecutorial vindictiveness

which unconstitutionally prejudiced his Sixth Amendment right to a jury trial. However, in *U.S. v. Goodwin*, 457 U.S. 368, 380 (1982), the Supreme Court held:

> An initial indictment -- from which the prosecutor embarks on a course of plea negotiation - - does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.

Seeking the felony indictment was clearly within the prosecutor's discretion as a part of plea negotiations. Therefore, petitioner's Sixth Amendment claim is unfounded.

Accordingly, the petition is dismissed, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the respondents and

against the petitioner dismissing the petition.

/S/ Jacob Mishler

U. S. D. J.

United States District Court
Eastern District of New York

----------X

RICHARD K. JACQUIN,

Petitioner,

-against-

WALTER STENZIL, Warden, Nassau County and Correctional Center,

Respondent.

----------X

CV 88-3137

Memorandum of Decision and Order

February 21, 1989

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MISHLER, District Judge

This court dismissed the petition of Richard K. Jacquin on the ground that the petitioner did not preserve his right to contest the admissibility of statements in violation of his Fifth Amendment right, in failing to object to the evidence at the time it was offered at trial. We believe a substantial issue is presented.

Petitioner also claims that he was prosecuted for a felony out of vindictiveness of

the prosecutor in response to petitioner's refusal to plead guilty to a misdemeanor charge - - a violation of his Fourteenth Amendment right not to be punished for doing what the law permits him to do (mislabeled as a Sixth Amendment violation).

This application for a certificate of probable cause pursuant to 28 U.S.C. § 2253 is granted.

Execution of the sentence imposed in the New York Supreme Court, Nassau County is stayed, pending appeal.

SO ORDERED.

/s/ Jacob Mishler
U. S. D. J.

United States Court of Appeals

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and eighty-nine.

Present: Hon. RALPH K. WINTER
Hon. J. DANIEL MAHONEY, Circuit Judges,
Hon. EDWARD D. RE, Chief Judge, United States Court of International Trade, sitting by designation.

RICHARD K. JACQUIN,
Petitioner-Appellant,

-v-

WALTER STENZIL, Warden, Nassau County Correctional Center,
Respondent-Appellee.
Docket No. 89-2064

Appeal from the United States District Court for the Eastern District of New York.

This cause came on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith
Clerk
/s/ Edward J. Guardaro
BY: Edward J. Guardaro
Deputy Clerk

Issue as mandate: Oct. 25, 1989

Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SAPNIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

RICHARD K. JACQUIN,

Petitioner,

vs.

WALTER STENZIL, Warden, Nassau County Correctional Center,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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No. 1287

In The

Supreme Court of the United States

October Term, 1989

RICHARD K. JACQUIN,

Petitioner,

vs.

WALTER STENZIL, Warden, Nassau County Correctional Center,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The petitioner has sufficiently set forth the opinions of the courts below which are reproduced as appendices to the petition. The basis upon which certiorari jurisdiction is asserted is adequately stated.

STATEMENT OF THE CASE

On May 6, 1983 petitioner, Richard K. Jacquin, was observed by officers of the Alcohol Safety Patrol of the Nassau County Police Department operating his automobile erratically and in the wrong lane of traffic. The petitioner was stopped by the police but refused the officers' requests that he submit to roadside sobriety testing. The petitioner was placed under arrest for driving while intoxicated[1] and transported to a police facility (the Central Testing Unit) where, under controlled conditions, persons suspected of driving while intoxicated perform an array of physical exercises intended to reveal the degree of their inebriation. Before he was advised of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), the petitioner was asked to walk a straight line, touch his fingers to his nose while leaning backward, and to retrieve coins from the floor and place them on the edge of a table. In the course of the testing procedure, which was recorded on videotape, the following conversation occurred:

> [Police Officer John McCormick] . . . is Officer McCormick, a breathalyzer technician with the Police Department, County of Nassau. The time is now 1:50 a.m. May 6, 1983. What is your name?
>
> [The petitioner, Richard K. Jacquin]: Richard.
>
> McCormick: Richard what?
>
> Petitioner: Richard Jacquin.
>
> McCormick: And how old are you?
>
> Petitioner: Fifty-six.

---

1. New York Vehicle and Traffic Law § 1192(3).

McCormick: And where do you live?

Petitioner: 170-06 Crocheron Avenue.

McCormick: All right, at 1:00 a.m. May 6, 1983 you were arrested by Police Officer [Schneider], Shield #638, of the Highway Patrol Bureau, for driving while intoxicated. The arresting officer has also advised you of the consequences of your refusal to submit to a chemical test for intoxication. At 1:45 a.m. you indicated your refusal to submit to a breath test.

Petitioner: Right.

McCormick: All right. Now, Mr. Jacquin, you . . . have refused to take a breathalyzer test, is that right?

Petitioner: That's right.

McCormick: And you have been told that because of your refusal your driver's license would be suspended, is that correct?

Petitioner: That's right.

McCormick: How long have you had your driver's license?

Petitioner: Gee . . . many years.

McCormick: And do you own a car?

Petitioner: Yes.

McCormick: And, when did you get your driver's license?

Petitioner: When I was [unintelligible] . . . it was many years ago.

McCormick: And do you need your license to get to work?

Petitioner: Yes I do.

McCormick: And knowing that your license will be suspended do you still refuse to take the test?

Petitioner: Yes.

McCormick: All right. Do you have any injuries sir?

Petitioner: Pardon?

McCormick: Do you have any injuries?

Petitioner: Ah, not at the . . . not at the moment anyway.

McCormick: Are you using any medication?

Petitioner: No.

McCormick: Are you a diabetic?

Petitioner: No, not that I know of.

McCormick: All right —

Petitioner: I broke my back . . . I mean, I don't know if I'm disabled . . . I don't think so.

McCormick: Okay, sir, will you follow me down this line. Right here. Face this direction. All right. The first thing I want you to do, I want you to walk along this line in this fashion, heel-to-toe. All right?

Petitioner: Yeah.

McCormick: When you get down to the end of that line I want you to turn on the line, right, about face, and walk back heel-to-toe.

Petitioner: Where did you want me to do that?

McCormick: On this line here.

Petitioner: Turn around?

McCormick: Yes. Okay, Now step over here. All right. Now I'm going to place these coins on the floor and I want you to pick them up one at a time and place them onto this desk, heads up, half on and half off.

Petitioner: Right, I . . . I should use my glasses but [unintelligible] .. but you took my glasses away.

McCormick. All right just put them up there half on and half off onto the desk one at a time.

Petitioner: What does that mean "half on and half off?"

McCormick: What I just demonstrated to you, sir.

Petitioner: I don't know what that means, "half on and half off."

McCormick: All right, the coins were just placed up on the desk, not half on and half off. All right. I want you to just stand on the end of this line here. All right. I want you to do this. I want feet together and hands at your side. All right. Now watch me. All right, just look at me. I want you to put your head back and close your eyes and just hold that position, head all the way back. Okay. And now, turn and face me. All right.

Petitioner: Same way? Or . . .

McCormick: No. Face me.

Petitioner: Oh, face you.

McCormick: All right. Feet together . . .

Petitioner: Yeah.

McCormick: Hands at your side. Head back, eyes closed, just like that. Head all the way back. Okay. Open your eyes and face this direction again. All right. Now I want you to do this: Place your arms out, the index fingers extended. All right. Head back with your eyes closed. I just want you to touch the tip of your nose. Right hand, then your left.

> Petitioner: Right hand and then your left? Right hand?
>
> McCormick: Right. Now the left. Okay. All right. This completes the performance test. Okay. Want to follow me?

The petitioner was ultimately indicted on a felony charge of driving while intoxicated. New York Vehicle and Traffic Law §§ 1192(3), 1193(c). Prior to trial, he moved to suppress the entire sound portion of the videotape, claiming that this colloquy amounted to custodial interrogation in violation of his *Miranda* rights. At the conclusion of the hearing, the petitioner argued that all of his statements recorded on the videotape should be suppressed, with the exception of his refusal to submit to the chemical analysis of his breath.[2] The court inquired: "Just what statements were made on that videotape that you think are subject to *Miranda* rulings?" The petitioner replied, "Any conversation . . . beyond [that relating to the] refusal." In reply, the court noted "that is what we very often do . . . just edit that portion of it and show the performance tests."

The trial court nevertheless denied the motion in its entirety. Acknowledging that it was petitioner's position that all conversations beyond refusal were required to be suppressed in the absence of the prior waiver of his *Miranda* rights, the court held that "[N]o express questioning [had occurred] during the tests requiring verbal responses by the [petitioner] unless he did not understand the instructions of the testing officer" and, that such "exchange of conversation" as did occur was not the functional equivalent of interrogation. The videotape was played

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2. *Cf. South Dakota v. Neville*, 459 U.S. 553 (1983).

in its entirety before the jury[3] and the petitioner was convicted as charged.

The petitioner appealed from this judgment to the Appellate Division of the Supreme Court of New York ("Appellate Division"). He argued, *inter alia,* that with the exception of the questions and answers on the videotape regarding the chemical testing of his breath, the remainder of the colloquy preserved on the tape was admitted into evidence in violation of his federal constitutional rights. The state opposed solely on the merits and the Appellate Division affirmed the judgment without reference to the issue. *People v. Jacquin,* 124 A.D. 2d 594 (2nd Dept. 1986).

The petitioner obtained permission to appeal to the New York State Court of Appeals from an associate judge of that court. The admissibility of the sound portion of the videotape was the principal claim and the issue was joined by the parties exclusively on the merits. Initially, the court specifically noted that the trial court's determination that the audio/visual tape should not be suppressed was upheld by the Appellate Division. The court further ruled that "any colloquy between the test-giver and the defendant not constituting custodial interrogation" preserved in an audio/visual record of physical performance tests was admissible even if it was not preceded by the *Miranda* warnings. The court went on to state that because the petitioner had moved to suppress "audio portions of the tape generally" rather than identifying "the specific questions and answers he found objectionable" the petitioner had failed to preserve the issue for appellate review under applicable state law. *People v. Jacquin,* 71 N.Y. 2d 825, 826-27 (1988).

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3. Certain documentary evidence which duplicated some of the material already ruled admissible *via* the sound portion of the videotape was admitted into evidence without objection.

The petitioner then applied to the United States District Court, Eastern District of New York (Mishler, J.) pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus, alleging, *inter alia*, that the admission of the sound portion of the videotape violated his rights under the Fifth Amendment. The court dismissed the petition, holding simply "it is not within the authority of this court to review the propriety of a declaration of state procedural law by [a] state's highest court." The court then concluded that the underlying constitutional question was not so "novel" a claim as to justify petitioner's failure to have formulated it with the necessary concreteness to satisfy state preservation rules. *Cf. Wainwright v. Sykes*, 433 U.S. 72 (1977). The court also noted that petitioner's failure to object to the admission of other evidence duplicative of the already-admitted videotape was an additional bar to consideration of the merits of the claim in habeas corpus. The United States District Court nevertheless granted a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253. The United States Court of Appeals for the Second Circuit affirmed the District Court's denial of the writ. Ruling that the merits of a state procedural bar does not in and of itself present a federal question, the court found that since certain of the videotape statements were admissible pursuant to the pedigree exception and, since petitioner did not identify the specific questions and answers he found objectionable, despite the "prodding" of *nisi prius* to articulate "a more specific objection," the petitioner violated a state procedural rule requiring specificity — a rule, they concluded, petitioner could reasonably have anticipated would apply to his case.

SUMMARY

The New York State Court of Appeals ruled that the petitioner was procedurally barred from raising a federal constitutional claim before that court because he violated a state procedural rule requiring that objections to the admission of evidence be made to a trial court with sufficient specificity to alert the court to the legal basis of the claim.

The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals held that they were without authority to review the merits of a state court's declaration of procedural default. Upon examination of the default both courts concluded that the petitioner could not satisfy the test of *Wainwright v. Sykes,* 433 U.S. 72 (1977) and denied petitioner's request for the writ of habeas corpus.

The petitioner claims that his constitutional right against self-incrimination was violated when, absent the waiver of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), he was compelled to exhibit verbal behavior which revealed the degree of intoxication, an element of the crime charged. This Court has accepted a case which appears to present this issue *Pennsylvania v. Munoz,* No. 89-213 leaving nothing on the merits of petitioner's case independently to be decided.

ARGUMENT

I.

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED.

The petition presents two questions: (A) whether a habeas corpus court may reach the merits of a constitutional claim upon a finding that a state court had erroneously applied an otherwise facially valid and historically established procedural default rule to the particular facts and circumstances of the case; and (B) whether a videotape recording of speech behavior, obtained without the waiver of rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), is admissible at the trial of a person accused of driving while under the influence of alcohol, as proof of the degree of intoxication.

A. The court below properly refused to examine the propriety of the state court's application of a state procedural default rule.

The New York State Court of Appeals and the Second Circuit Court of Appeals ruled that certain established exceptions to the forms of custodial interrogation that constitute "compelled testimonial self-incrimination" for *Miranda* purposes applied to offenses based on the extent to which physical competence, including linguistic, is affected by alcohol. The New York State Court of Appeals based its finding of procedural default on the ground that these exceptions were applicable to petitioner's case and, that petitioner had therefore "failed to identify the specific questions and answers he found objectionable." *People v. Jacquin,* 71 N.Y. 2d 825, 826 (1988). The Second Circuit Court of Appeals held that the state rule was reasonably applied to the facts of petitioner's case and that the application of this rule was not so novel that petitioner could not have reasonably anticipated he

risked procedural default by the form of his objection.[4] This conclusion reflects the proper scope of federal habeas corpus review of whether a state court procedural default bars review of the merits of a constitutional claim. Thus, the application for the writ of certiorari should be denied.

When a state's highest court of review asserts a procedural default rule as a basis for decision, it is well-established that a federal question is presented as to whether the rule amounts to "an adequate and independent state ground" of decision to preclude review of the merits in federal court. *Johnson v. Mississippi*, ____ U.S. ____, 108 S. Ct. 1981, 1987 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). This rule received its modern formulation in habeas corpus [*Henry v. Mississippi*, 379 U.S. 443, 447 (1965)] and was restated in *Wainwright v. Sykes*, 433 U.S. 72, 85-86 (1977)[5] to permit a federal court to proceed to the merits of a constitutional claim upon a finding that the state procedural rule was in some measure "inadequate," without requiring satisfaction of the cause and prejudice test.[6] *See Reynolds v.*

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4. Before trial, petitioner moved generally to suppress the entire sound portion of the videotaped performance tests because no *Miranda* warnings had been given before he was questioned. Although asked to particularize his objection by the trial judge, petitioner's counsel refused to designate which questions and answers offended Fifth Amendment requirements.

5. In *Wainwright* the court accepted the state's contention that the Florida rule of preservation *as applied* to Sykes's case, was "quite consistent with a line of Florida authorities interpreting the rule in question." The petitioner was therefore required to satisfy the "cause and prejudice" test of *Francis v. Henderson*, 425 U.S. 536 (1976).

6. The distinction is substantial since the "prejudice" test requires that a petitioner demonstrate that the error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions"

(Cont'd)

Ellingsworth, 843 F.2d 712, 717 (3rd Cir. 1988). The limits of inquiry into the "adequacy" of a state procedural rule is not entirely clear. Generally, a federal court is bound by a state's constructions of its own law.[7] Hence, a federal court is required to accept a state court's characterization of the existence of a state preservation rule along with "the content attributed to it by the court." *Middleton v. Cupp,* 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied, 478 U.S. 1021 (1986); Wilson v. Jones,* 723 F. Supp. 629, 632 (N.D. Ala. 1989) ["federal courts have traditionally allowed state courts to have the final say on their own procedural rules . . ."]. *Cf. Jacquin v. Stenzil,* 886 F.2d 506 (2d Cir. 1989). On the other hand, this Court has recently held that state constructions of matters of state law will not be disturbed where they are "reasonable," implying both a finite boundary to the extent to which state pronouncements on state law need be respected and, that a federal court is empowered to determine whether, as a matter of federal law, a state construction of state law, in a particular case, was so "unreasonable" as to permit

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(Cont'd)

[*Holland v. Scully,* 797 F.2d 57, 69 (2d Cir.), *cert. denied,* 479 U.S. 870 (1986) *citing United States v. Frady,* 456 U.S. 152, 170 (1982)], a more demanding standard than a harmless error test. *See Murray v. Carrier,* 477 U.S. 478, 493-94 (1986). Petitioner does not claim that the error in his case resulted in the conviction of someone "actually innocent," a showing that would also permit bypass of the cause and prejudice test. *Smith v. Murray,* 477 U.S. 527, 537 (1986). The contours of the "cause" prong was a matter expressly left to future cases for definition (*Wainwright v. Sykes, supra* at 87) and courts have generally limited findings of "cause" to where the constitutional claim was "reasonably unknown" to petitioner or where some "objective factor," such as official interference, rendered compliance with the default rule impracticable. *Amadeo v. Zant,* 486 U.S. ____, 108 S. Ct. 1771, 1776 and citations therein.

7. *Mullaney v. Wilbur,* 421 U.S. 684, 691 & n.11 (1975) [state courts are the "ultimate expositors of state law" except in "extreme circumstances" such as where consideration of a federal claim is avoided by an "obvious subterfuge."].

the federal court to reach the merits of the underlying claim. *Ricketts v. Adamson,* ____ U.S. ____, 107 S. Ct. 2680, 2683-84 and n. 3 (1987). Moreover, since a federal habeas court is not bound by conclusions of evidentiary fact not fairly supported by record, including those made by a state appellate court [28 U.S.C. § 2254(d); *Sumner v. Mata,* 449 U.S. 539, 544-47 (1981)], it follows that a federal habeas corpus court may (1) inquire as to whether a state appellate court's findings as to the facts and circumstances of an appellant's procedural default are fairly supported by the record, and (2) whether a state appellate court's conclusion that a pre-existing state rule of preservation applied to those "procedural facts" was "reasonable". *Compare County Court of Ulster County v. Allen,* 442 U.S. 147, 149-53 (1979).

However, absent a claim of a "fundamental miscarriage of justice," a petitioner's options for obtaining federal review of the propriety of the state's procedural bar should be limited to one of the grounds — the constitutional claim was "reasonably unknown" or an "objective factor" rendered compliance with default rule impracticable — enunciated in *Amadeo v. Zant, supra. See e.g., Johnson v. Trickery,* 882 F.2d 316, 320 (8th Cir. 1989). Notwithstanding petitioner's claim to the contrary, the federal courts were required to inquire no further into the propriety of the state default and correctly declined to review the state's construction of its own law. The petitioner has never claimed that the state preservation rule was facially an improper vehicle to bar state-court consideration of federal constitutional claims, that it had not been "strictly or regularly" applied, or that he was prevented, by some "objective factor" from complying with its terms. The federal courts below correctly held that upon these facts, the only issue for their review was whether the application of the rule to his case could not reasonably have been anticipated. *Reed v. Ross,* 468 U.S. 1, 16 (1984). Inasmuch as the court below correctly answered that question in the affirmative, petitioner's application for a writ of certiorari should be denied.

B. This Court should not review the merits.

Petitioner was compelled to submit to physical performance tests without having received the *Miranda* advisements. Videotape recordings of these tests usually memorialize the suspect's speech behavior as he or she responds to questions or instructions ancillary to the administration of non-verbal coordination tests. If a suspect's verbal behavior, such as the capacity to articulate speech, to express oneself coherently and appositely, and to recall information has degraded in a manner corresponding to what a juror or other fact finder associates with the effects of the consumption of intoxicants, evidence of such speech derangement, preserved on the sound portion of a videotape, may, as in petitioner's case, support proof of guilt. However, because the compelled production of mere physical evidence is generally exempted from the *Miranda* requirement [*Schmerber v. California,* 384 U.S. 757 (1966)] including, for limited purposes, speech acts [*United States. v. Wade,* 388 U.S. 218 (1967)], the verbal component of physical coordination testing has been ruled admissible by many state courts and at least two federal jurisdictions. In *People v. Roadifer,* 346 N.W. 2d 438 (S.D. 1984) and *Commonwealth v. Brennan,* 438 N.E. 2d 60 (Mass. 1982), the courts admitted the evidence because the content of the suspect's responses was not "inherently" incriminating. In *Jacquin v. Stenzil,* 886 F.2d 506 (2d Cir. 1989), *Edwards v. Gray,* 688 F.2d 91 (10th Cir. 1982) and *Commonwealth v. Mahoney,* 510 N.E. 2d 759 (Mass. 1987), the courts ruled these statements to be merely "pedigree" and responses to the "booking procedure." Finally, in *McAvoy v. State,* 523 A.2d 618 (Md. 1987) and *State v. Brandenberg,* 534 N.E. 2d 906 (Ohio 1987), the courts admitted the statements holding that the purpose of the questioning was not to elicit responses relating to the elements of the crime but "merely" to display the subject's physical condition.

Several state jurisdictions have taken a contrary position,

asserting, as did petitioner at his state court suppression hearing, that in prosecutions where the accused's physical condition is the gravaman of the offense, the admission of *any* compelled speech evidence amounts to a Fifth Amendment violation absent the prior waiver of the *Miranda* rights. *Commonwealth v. Waggoner,* 540 A.2d 280 (Pa. 1988); *Miffleton v. State,* 728 S.W. 2d 880 (Tex. 1987); *State v. Nece,* 501 A.2d 1049 (N.J. 1985); *People v. Fenelon,* 303 N.E. 2d 38 (Ill. 1973).

In *Pennsylvania v. Bruder,* ____ U.S. ____, 109 S. Ct. 205 (1988) this Court expressly reserved the question of whether a verbal sobriety test, in response to "unwarned" custodial interrogation, is testimonial and therefore inadmissible pursuant to *Miranda*. Thereafter, on October 19, 1989, this Court decided to address this issue and granted certiorari in *Pennsylvania v. Munoz,* No. 89-213. Accordingly, although petitioner's substantive claim presents an issue of constitutional significance that has received inconsistent analysis in various state courts and two federal circuits, certiorari should be denied both because the issue is already before this Court and because review is otherwise procedurally barred.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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